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IN THE

Supreme Court of the United States

October Term, 1966

No. .....

THOR-DAHL A/S,

Petitioner,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari in the Supreme Court of the United States.

Respondent, Crescent Wharf & Warehouse Company, a corporation, respectfully prays that the petition of Thor-Dahl A/S that a writ of certiorari issue to review that part of the final judgment of the Supreme Court of the State of California entered April 22, 1967, in favor of Crescent Wharf and Warehouse Company, a stevedoring company, and against Thor-Dahl A/S, a shipowner, be denied.

CITATIONS TO OPINIONS BELOW.

The opinion of the California District Court of Appeal, Second Appellate District, Division I, is reported at 248 A.C.A. 1045 (1967) and is printed as Appendix A hereto.

STATEMENT OF THE CASE.

On or about December 13, 1961, the petitioner brought its vessel, THORSISLE, to San Diego to be loaded and unloaded by respondent, Crescent Wharf & Warehouse Company. The vessel, THORSISLE, as well as all of its gear, was owned, operated, maintained and repaired exclusively by the petitioner up to said date. At no time did the respondent, Crescent Wharf & Warehouse Company, or any of its employees, maintain or repair any of the vessel's gear.

Immediately upon the commencement of work by the stevedore company aboard the vessel, a piece of the vessel's gear, to wit, a stopper clamp, which had always been maintained and repaired, as well as greased and painted, only by the ship's crew, gave way as the result of a defect which was not only unknown to the stevedore company at all times but was also hidden from view. In addition, the evidence was that the defect which gave rise to the plaintiff's injuries was doubtlessly created by the officers and crew of the ship themselves.

REASONS FOR DENYING THE WRIT.

A. The Protection of an Individual Longshoreman Is Not Involved in This Case.

Counsel for petitioner attempts to convey the impression that the granting of the writ would in some manner serve to protect individual longshoremen from injuries occurring aboard ships. However, at issue are not the rights afforded individual longshoremen, for the longshoreman-plaintiff herein was well protected from the unseaworthiness of the THORSISLE by the General Maritime Law of the United States and in

fact he made a substantial recovery against the ship on the basis of the doctrine of unseaworthiness.

What we are faced with here is the effort of the ship to shift the responsibility it bears for unseaworthy conditions, which it has created in its own equipment, to the stevedore company, which stevedore company did not play any part in the creation of the defective condition and was absolutely unaware of its existence at the time the accident occurred.

B. The Questions Presented Have Long Been Well Settled.

The Courts of Appeals of the United States have repeated again and again that the stevedore's implied warranty of workmanlike service does not place upon the stevedore company a duty to discover defects in the apparatus or equipment furnished by the vessel which defects are not obvious upon a cursory inspection.

Ignatyuk v. Tramp Chartering Corp., 250 F. 2d 199 (2nd Circuit 1957);

Calderola v. Cunard Steamship Company, 279 F. 2d 475 at 478 (2nd Circuit 1960), Cert. Den. 364 U.S. 884, 81 S. Ct. 172, 5 L. Ed. 2d 104;

Cia Maritima, Etc. v. Flanagan Shipping Corp., 308 F. 2d 120 at 125 (5th Circuit 1962);

Orlando v. Prudential SS Corporation, 313 F. 2d 822 at 823 (2nd Circuit 1963);

T. Smith & Son, Inc. v. Skibs A/S Hassel, 362 F. 2d 745 (5th Circuit 1966).

Petitioner, by reference to The Safety and Health Regulations for Longshoring, would seek to impose responsibilities upon the stevedore company which have historically been those of the ship because of the ship's better position to carry them out. Interestingly enough, petitioner in its petition fails to mention Section 9.2(b) of the Regulations which states:

> (b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, *nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.* (Italics ours).

It seems to be practically a matter of which judicial notice could be taken that a shipowner has been, through long-established custom, and now is responsible for the condition of the permanent gear of his own ship which is constantly maintained, repaired, painted and greased only by members of its own ship's crew, and that these regulations do not relieve him of said responsibility which, in the case at bar, was fastened on the shipowner by the jury under the evidence.

C. The Decision of the Court Below Is Not Erroneous.

The stevedore company herein feels that its position is properly and well stated in the decision of the Court of Appeals of the State of California which appears herein in Appendix A. Since that court has so correctly stated the position of respondent-

stevedore company the respondent will not attempt to enlarge upon its position as so enunciated by said court.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

August 18, 1967.

Respectfully submitted,

HENRY E. KAPPLER,
Attorney for Respondent.

Of Counsel:
SIKES, PINNEY & MATTHEW,
JOHN SCOTT MATTHEW.

APPENDIX A.

ARTHUR FLORES,
Plaintiff and Respondent,

- vs -

PACIFIC ISLAND TRANSPORT LINES, et al.,
Defendants and Appellants,

and

CRESCENT WHARF & WAREHOUSE COMPANY,
Cross-Defendant and Respondent.

CIV. NO. 30728

Court of Appeal
Second Dist.
FILED
FEB 27 1967
Clay Robbins, Jr.
Clerk

.....
Deputy Clerk

APPEAL from judgment of the Superior Court of Los Angeles County. John Stuart Frazer, Judge.

Counsel for Appellants: Lillick, Geary, McHose & Roethke, and Lawrence D. Bradley, Jr.

Counsel for Respondent *Arthur Flores:* Magana, Olney, Levy and Cathcart, Mitchell Levy, Ellis J. Horvitz and Morton Minikes.

Counsel for Cross-defendant and Respondent *Crescent Wharf & Warehouse Company:* Sikes, Pinney & Matthew, and John Scott Matthew.

This action was instituted by longshoreman Arthur Flores (hereinafter called Flores) against ship's owner Thor-Dahl A/S (hereinafter called Thor-Dahl) for damages for personal injuries suffered when, in the course of his employment by Crescent Wharf & Warehouse Company (hereinafter called Crescent), Flores was engaged in unloading the vessel Thorsisle. Thor-Dahl filed a cross-complaint for indemnity against

Crescent and the jury returned a verdict of $78,850 in favor of Flores but denied indemnity to Thor-Dahl; judgment was entered accordingly. Because the accident was sustained by a longshoreman aboard a seagoing vessel, this action is controlled by federal maritime law in both its substantive and its procedural aspects. (*Vittone v. American President Lines,* 228 Cal. App.2d 689, 693; *Kermarec v. Transatlantique,* 358 U.S. 625; *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 409.)

Appellant Thor-Dahl contends that the jury was improperly instructed concerning the nature and extent of Crescent's duty as a stevedore company under contract to unload Thorsisle with respect to its implied warranty of workmanlike service. It is Thor-Dahl's further contention that this instruction adversely influenced the jury in its deliberations on the issue of damages as evidenced by the fact that it failed to reduce the award to accommodate for the contributory negligence of Flores. The pivotal issue herein is the extent of the responsibility owed by the stevedore company and its employee to discover and remedy latent defects in the ship's equipment, unknown to the vessel's crew or the stevedore company beforehand.

The vessel Thorsisle was a Norwegian ship owned and operated by Thor-Dahl and engaged in carrying cargo and passengers between ports on the west coast of the United States and islands in the South Pacific. Flores was 34 years old and had, at the time of the accident, about seven years' experience in all phases of work as a longshoreman. When he reported to the longshoremen's Union Hall for a work assignment on December 13, 1961, he was dispatched to the employ of Crescent to assist as a winch-driver in unloading the

Thorsisle. According to custom, he reported to the hatch boss at the vessel, and was assigned to one of the winches to perform familiar duties. His first task in preparation for the unloading operation was to lower the yard boom from the upright position in which the ship's crew had previously placed it.

The boom is fitted with a topping lift cable which raises the boom from the cradle in which it rests while the vessel is at sea and holds it in an elevated position in anticipation of its use in port. When the boom is so elevated, the topping lift cable is wrapped in a few circles and then in figure eights around cleats on the deck floor to keep the cable taut. In order to lower the boom by means of the winch the topping lift cable must be transferred from the cleats to the gypsy head of the winch. Since there is always a strain on the topping lift cable whenever the boom is out of its cradle, a stopper is provided at each boom to hold the topping lift cable temporarily in place while the cable is transferred from the gypsy head to the cleats or vice versa. These stoppers may be clamp-type, as were those on the Thorsisle, with the two halves hinged at one end, a wing or butterfly nut at the other end, and a rifled groove down the middle of each clamp face so that when the topping lift cable is in place it fits snugly into the groove.

Topping lift cables are comparatively heavy, stiff cables with a natural tendency to spring off the cleats so the man handling the cable must, as a precaution, hold the cable taut throughout the transfer from cleats to gypsy head. Moreover, there is always the possibility that the topping lift cable will not be held firmly by the rifling in the groove of the stopper and the man who lowers the boom must test the stopper. There is no test

or inspection that can be made beforehand to determine that the stopper will hold the cable once it is undone from the cleats. Instead, the stopper is tested in use by placing the cable in the stopper, then tightening the stopper by turning the butterfly lever, thereafter removing the figure eights from the cleats, and finally loosening or "surging" the cable slightly into the stopper to see if it holds. If the stopper holds properly, the topping lift cable is taken off the cleats and transferred to the gypsy head and the boom is lowered by means of the winch. In the event the stopper fails to hold, the longshoreman must pull hard on the cable and attempt to return the figure eights to the cleats. The longshoreman who performs this operation must work alone up to the point where the cable has been transferred to the winch.

In the instant case, Flores testified that he tightened the stopper by turning the butterfly lever as hard as he could until the faces of the stopper appeared to be pressing tightly against the cable and then proceeded to remove the small line which is tied about the cleats above the figure eights to secure the cable. He thereafter removed the figure eights of cable from the cleats and surged the cable to make sure the stopper would hold, but the stopper did not hold and the cable started to run rapidly through the stopper. Flores tried to stop the running cable by pulling back hard, but because of the limited work area he could not gain the necessary leverage and, as he could not prevent his hands from being drawn to the cleats, he let go of the cable which started to snake in and out and finally hit him, throwing him to the deck of the ship. He testified that he had time in the instant before he fell to notice that the butterfly lever on the stopper was spinning backwards.

Some five or ten minutes after the accident one of Flores' fellow longshoremen aboard the Thorsisle examined the stopper clamp and observed that the inside face of the clamps had a build-up of paint drippings about a quarter of an inch thick and a substantial accumulation of heavy grease and paint chips but when he looked later the same day these faces had been scraped free of the excess paint and grease. Subsequent testimony of this witness and the ship's then chief officer established that the accumulation of paint and grease on the inside face of stopper clamps aboard a vessel is a recognized maritime hazard and one that the ship's crew customarily takes precaution to avoid because this prevents the stopper from holding well.

Flores suffered, as a result of the accident, a severe compound fracture of his leg which required emergency surgery in which a plate and four screws were inserted to hold his leg straight. The plate was later removed and a metal pin inserted across the fracture while, at the same time, grafts were made of bone from Flores' other hip to encourage new bone formation. Finally, after spending some 22 months in a hip length cast, Flores was able to return to work in a limited capacity with some attendant pain and difficulty.

In maritime cases the rule of comparative negligence applies, and Thor-Dahl claims that a new trial should be granted because the jury did not reduce the amount of the award to reflect the alleged contributory negligence of Flores, thus rendering the verdict excessive as a matter of law. The jury was justified in concluding, however, from substantial evidence at the trial, that Flores' negligence, if any, was not a contributing factor in the accident.